

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**DON BLANKENSHIP,
Plaintiff,**

**Civil Action No.: 2:19-cv-00236
Judge John T. Copenhaver, Jr.**

v.

**HONORABLE ANDREW NAPOLITANO (RET.),
et al.,
Defendants.**

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Defendants Breakfast Media, LLC and Andrew Feinberg, by and through William Moran II, Esq. and Adriana Marshall, Esq. and pursuant to Local Civil Rule 7.1(a)(2), hereby submit this memorandum of law in support of their jointly filed Motion to Dismiss for Failure to State a Claim, Fed. R. Civ. P. 12(b)(6), and lack of personal jurisdiction, Fed. R. Civ. P. 12(b)(2).¹

This Court should dismiss the Amended Complaint because (a) Plaintiff fails to plausibly plead actual malice; (b) the alleged statement was a question and is *ipso facto* non-actionable; (c) Plaintiff does not plausibly plead the requisite emotional injury for a false-light claim; (d) Plaintiff does not plausibly plead conspiracy; and (e) Plaintiff fails to plead personal jurisdiction.

INTRODUCTION

This action, brought forward by a disgraced coal baron and former federal prison inmate who moonlighted as the villain in a John Grisham novel (*infra* n.3), can only be characterized as a reverse class-action defamation case that seeks to improperly plead several hundred discrete

¹ Defendants Breakfast Media and Andrew Feinberg (hereinafter “Defendants”) concurrently file a Motion pursuant to D.C. Code §16-5502 (the D.C. Anti-SLAPP Act) as the choice-of-law under West Virginia’s *lex loci delicti* doctrine is D.C. law and the D.C. Court of Appeals interpreted the statute as providing publishers substantive rights.

causes of action under two umbrella counts without so much as even making a stray attempt at pleading actual malice for each specific statement by the over 100+ Defendants. This lawsuit is a wealthy vexatious litigant's attempt to bring the First Amendment to its knees, holding the nation's entire press corps hostage by brandishing mass frivolous litigation. Every second that passes before this action is dismissed represents a flagrant and irreparable injury to our values of free speech and freedom of the press. This Court may, on its own initiative, apply sanctions pursuant to Fed. R. Civ. P. 11(c)(3) to send a resounding message to anybody else who might otherwise similarly seek to mutilate the First Amendment with such costly frivolous litigation.²

FACTUAL BACKGROUND

A. THE EXPLOSION AT THE UPPER BIG BRANCH MINE

The Disaster at Upper Big Branch

On April 5, 2010, twenty-nine miners were killed during an explosion at Massey's Upper Big Branch Mine under the leadership of Plaintiff Don Blankenship. Amended Compl. ¶¶ 7-8. Ten days later, then-President of the United States Barack Obama declared that the miners' deaths were the result of "a failure first and foremost of management" including Plaintiff Blankenship. *Id.* at ¶137. In May 2011, the West Virginia Governor's Independent Investigation Panel released a report in concurrence with President Obama's assessment titled: "Upper Big Branch -- The April 5, 2010, explosion: a failure of basic coal mine safety practices."³ The report found that "many systems created to safeguard miners had to break down in order for an explosion of this magnitude to occur" pointing not only to ventilation, but also that there had to

² We do not intend to file a Rule 11 Motion out of respect for judicial resources given the number of Defendants.

³ <http://s3.documentcloud.org/documents/96334/upperbigbranchreport.pdf> - On a Rule 12(b)(6) motion, a court may consider readily available, judicially noticeable news coverage, including Internet and social media postings, about plaintiff and the broader context in which the allegedly defamatory statements were made. *See, e.g., Farah v. Esquire Magazine*, 863 F. Supp. 2d 29, 35 (D.D.C. 2012) (taking judicial notice on Rule 12(b)(6) motion of a broad range of materials, including "various internet postings" to establish the political context of satirical article related to birther controversy, *aff'd*, 736 F.3d 528, 534 (D.C. Cir. 2013).

be a buildup of coal dust, “an inadequate rock dusting so that the explosiveness of the coal dust would not be diluted”; a failure to maintain machinery, and a “breakdown of the fire boss system through which unsafe conditions are identified and corrected.” n. 3.⁴

The Aftermath of the Disaster

In the wake of the Upper Big Branch Mine disaster, the 69-year-old Blankenship retired from the very business career that he now claims he suffered \$2 billion in damages allegedly as a result of Defendants’ statements. *Id.*; Amended Compl. ¶ 24. Years later, Plaintiff stood trial on three felony counts and one misdemeanor in relation to the Upper Big Branch disaster with the jury convicting him on the misdemeanor count and the court sentencing him to a one-year federal prison term. Amended Compl. ¶¶ 10-11.

B. HAEC VERBA OF THE ALLEGED DEFAMATORY STATEMENT

Plaintiff alleges that on “May 21, 2018, Breakfast Media published a tweet by Defendant Feinberg stating: “Hi @Don Blankenship [sic] Aren’t you a convicted felon?” *Id.* at ¶ 207. In fact, the full text of the tweet is, **‘The coal baron also said... that “the press and the establishment have colluded and lied to convince the public that I am a moron, a bigot, and a felon.”** Hi @DonBlankenship Aren’t you a convicted felon? Also, we report what you say, voters decide. Are you calling them stupid?” (bolded for emphasis).⁵ **The tweet in question received only a single retweet and six likes.**⁶

⁴ Under *Farah* and related case law, this court can take judicial notice of the fact that this was published by the Governor’s Independent Investigation team, but these cannot be and are not being presented for the truth of the matter asserted on a 12(b)(6) Motion. The point is that the Governor’s office made these statements publicly – that this is something that is out there – but the Court should not endorse these positions and for purposes of this Rule 12(b)(6) Motion we are neither contesting nor waiving the right to later contest Mr. Blankenship’s assertion that he was not personally responsible for the Upper Big Branch tragedy.

⁵ <https://twitter.com/AndrewFeinberg/status/998562208652111874>

⁶ Breakfast Media does not appear to have retweeted or republished Feinberg’s tweet on their account (@BroadbandCensus). We reserve the right to argue that Breakfast Media did not make any publication about Plaintiff at a later phase in the unlikely event this case moves forward.

Plaintiff did not respond to Mr. Feinberg’s tweet until eight months later when he bombarded the journalist with nine tweets on January 30, 2019 in which he accused Mr. Feinberg of “joking about China ships that are carrying [sic] Cocaine,”⁷ calling Mr. Feinberg a “moron,”⁸ and asking if Mr. Feinberg was “for pedophilia, drug deaths, for cocaine being transported on the high seas, [and] for calling people morons.”⁹ Plaintiff further conceded that Defendant Feinberg’s post did not plainly contain any assertion of fact, as he now alleges in the Amended Complaint, replying as follows: (1) “Are you saying that I am convicted felon?”¹⁰; and (2) “Tell us what you are saying [sic] not what the press said.”¹¹

CHOICE OF LAW

West Virginia observes the *lex loci delicti* conflict of law doctrine. *Paul v. National Life*, 177 W. Va. 427, 433 (1986) (“*Lex loci delicti* has long been the cornerstone of our conflict of laws doctrine... [h]aving mastered marble, we decline an apprenticeship in bronze. We therefore reaffirm our adherence to the doctrine of *lex loci delicti* today.”). The *lex loci* rule defines the “place of the [alleged] wrong” in defamation matters as where the publication occurred. *See Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir. 1992).

An instructive analysis on the application of the *lex loci delicti* doctrine to internet publications came out of Virginia this past month in the high-profile \$50 million lawsuit brought by actor Johnny Depp against his ex-wife Amber Heard. *Depp v. Heard*, 2019 Va. Cir. LEXIS 269 (Va. Cir. Ct. 2019) (Fairfax). In *Depp*, the court ruled that application of the *lex loci delicti* doctrine, even in a defamation case where a statement

⁷ <http://archive.is/0claX>

⁸ <http://archive.is/dEdZr>

⁹ <http://archive.is/5iVTT>

¹⁰ <http://archive.is/MKsmt>

¹¹ <http://archive.is/USjMX>

becomes available in multiple jurisdictions concurrently (such as a tweet), required the application of the law of the “place where the act of publication of [Defendant’s statement] to the internet occurred.” *Id.* at 13.

In the present case, Plaintiff contends that Defendant Feinberg is “domiciled” in the District of Columbia, that he served as the White House Correspondent and Managing Editor for Breakfast Media, an entity headquartered in D.C., and the Amended Complaint further imputes the publication of the tweet by Defendant Feinberg to his employer Breakfast Media. Amended Compl. ¶¶ 67, 123, 207. Thus, Plaintiff alleges the tweet was transmitted onto social media in the District of Columbia and under West Virginia’s *lex loci delicti* doctrine, D.C. law applies. As such, Defendants concurrently filed a special motion pursuant to the D.C. Anti-SLAPP Act. D.C. Code §§ 16-5502, *et. seq.*

LEGAL STANDARDS

Fed R. Civ. P. 8(a)(2) requires that a complaint include a “short and plain statement of the claim showing that the pleader is entitled to relief. Plaintiff’s Complaint must be dismissed if it fails to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility exists if the Plaintiff pleads sufficient factual content to allow a court to draw a reasonable inference of liability. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The plausibility standard of Fed. R. Civ. P. 8(a)(2) equally applies to the element of actual malice, technically governed by Fed. R. Civ. P. 9(b). *Mayfield v. NASCAR*, 674 F.3d 369, 377 (4th Cir. 2012); *see also Biro v. Condé Nast*, 807 F.3d 541, 545 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2015 (2016) (“[M]alice must be alleged plausibly in accordance with Rule 8” because “Fed R. Civ. P. 9(b)’s language notwithstanding, Fed. R. Civ. P. 8’s plausibility standard applies

to pleading intent.”); *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016) (“after *Iqbal* and *Twombly*, every circuit that has considered the matter has applied the *Iqbal/Twombly* standard... [and] [j]oining the chorus, we hold that the plausibility pleading standard applies to the actual malice standard”); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013) (“plaintiff must still point to details sufficient to render a claim plausible” applying *Iqbal* and *Twombly*’s Rule 8 standard). The Court in *Mayfield* explained that while Rule 9(b) does state that allegations such as fraud or malice may be “generally avered” that this phraseology was clarified in *Iqbal* which states that “‘generally’ is a relative term... Rule 9 merely excuses a party from pleading discriminatory intent under [Rule 9(b)’s] elevated [particularity] pleading standard [but] [i]t does not give him license to evade the less rigid – though still operative – strictures of Rule 8.” 674 F.3d at 377 (quoting *Iqbal*, 556 U.S. at 665).

The only scholarly source that has analyzed this issue across circuits concurred that “[w]hile Federal Rule of Civil Procedure 9(b) permits malice to be pleaded “generally,” all Circuit Courts of Appeals that have addressed the issue have applied the plausibility standard to allegations of malice under Rule 9(b) and that this effectively “gives virtual immunity to defendants who are sued for libel by public figure plaintiffs...” Judy M. Cornett, *Pleading Actual Malice in Defamation Actions after Twiqbal: A Circuit Survey*, 17 Nev. L.J. 709, 710 (2017).

Lastly, on a Rule 12(b)(6) Motion, a court must accept properly pled allegations in the Amended Complaint as true “constru[ing] the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff.” *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). However, Plaintiff’s counsel’s rhetoric is not an accepted substitute for properly pled facts and this Court is not obligated “to swallow the plaintiff’s invective hook, line and sinker; bald assertions, unsupportable conclusions,

periphrastic circumlocutions, and the like need not be credited.” *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996); *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) (the Court “need not accept as true [Plaintiff]’s allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice”); *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008) (same). Put simply, rhetorical flourishes and “[t]hreadbare recitals of the elements of a cause of action, supporting by mere conclusory statements, do not suffice” when assessing the plausibility of a complaint on a Rule 12(b)(6) motion. *Iqbal*, 556 U.S. at 678.

ARGUMENT

Courts favor early disposition of defamation claims – especially where the Plaintiff is a public figure and the Defendants are the press – because litigation costs can chill free speech. Charles A. Wright & Arthur R. Miller, *FEDERAL PRACTICE & PROCEDURE* 3D §1357 (“When the claim is a traditionally disfavored ‘cause of action,’ such as... libel, or slander, the courts [tend] to **construe the complaint by a somewhat stricter standard** and [are] **more inclined to grant a Rule 12(b)(6) motion to dismiss.**”) (bolded for emphasis). “Forcing publishers to defend inappropriate suits [and bear the] costs and efforts required to defend a lawsuit through [the discovery] stage of litigation could chill free speech nearly as effectively as the absence of the actual malice standard altogether.” *Michel*, 816 F.3d at 702; *see also Washington Post v. Keogh*, 365 F.2d 965, 998 (D.C. Cir. 1966) (“summary proceedings are essential in the First Amendment area because if a suit entails ‘long and expensive litigation,’ then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails.”).

Plaintiff now thrusts before this Court a disfavored cause of action without even taking a cursory swing at pleading the elements to the required plausibility standard for any of the over 100 statements rammed into two bizarre umbrella counts and instead chose to only put forward

the very type of “conclusory statements” and bald speculation that courts have refused to credit since *Ashcroft v. Iqbal*, 556 U.S. at 678. Immediate dismissal of this strategic lawsuit against public participation is the only proper recourse.

A. Plaintiff Fails to Plausibly Plead Actual Malice.

The Amended Complaint states, “**Mr. Blankenship may have been the only prisoner in any federal prison who had been convicted of just a misdemeanor.**” Amended Compl. ¶11 (bolded for emphasis). Plaintiff’s concession that he may have been the only federal prison inmate not convicted of a felony shows exactly why the media reasonably believed he was a convicted felon – “[a] **first time misdemeanant is never (or virtually never) sent to prison.**” *Id.* (bolded for emphasis). The standard is actual malice, not reasonable error, and Plaintiff Blankenship’s concession on this is the whole ball game (frankly, for all of the Defendants).

Plaintiff, a self-confessed public figure, contends that “[a]nyone who consulted the freely-available public records of Mr. Blankenship’s trial and conviction... would know [that Blankenship was only convicted on the misdemeanor count],” that simply is not the actual malice standard. *Id.* at ¶¶1, 230, 244. Actual malice “is not measured by whether a reasonably prudent man would have published, **or would have investigated before publishing,**” but by whether “the defendant in fact **entertained serious doubts as to the truth of [its] publication.**” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (bolded for emphasis); *see also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (actual malice requires a “high degree of awareness of... probable falsity”). In this action Plaintiff does not plead facts showing Defendants entertained serious doubts, but instead offers up the reason why they would likely believe he was a felon – he was sentenced to a year in federal prison which does not happen on a jaywalking violation.

Mr. Blankenship argues that journalists halfway across the country should locate and closely review West Virginia records before so much as posting a passing tweet on a high-profile U.S. Senate race while simultaneously complaining about the fast-paced, “digitized” and constant 24-hour competition between outlets for clicks and eyeballs that makes such precision impractical. *Id.* at ¶¶1, 230. Much to the contrary of Mr. Blankenship’s proposed standard, Courts have warned about the danger of imposing upon smaller publications a duty to verify prior reporting from other news outlets noting that it could make it impossible to compete with those publishers who “can afford to verify and litigate.” *Washington Post v. Keogh*, 365 F.2d 965, 973 (D.C. 1966); *Appleby v. Daily Hampshire Gazette*, 392 Mass. 32 (1985); *Layne v. Tribune Co.*, 108 Fla. 177 (1933) (“No newspaper could... assume in advance the burden of specifically verifying every item of news reported to it by established news gathering agencies.”).

In this case, Plaintiff alleges over 100 statements from FoxNews, NBC News, MSNBC, CNBC, the entire Republican Party, national newspapers and wire services, and acclaimed journalists who referred to Plaintiff Blankenship as a “felon” prior to the alleged statement by Defendants Feinberg and Breakfast Media. Defendant Feinberg’s tweet does not make an affirmative statement, it asks a clarifying question after quoting Plaintiff’s denial verbatim. Nonetheless, even had Defendant Feinberg woke up on the morning of May 21, 2018 and screamed from the mountaintops that “Don Blankenship is a convicted felon,” that would still not satisfy the actual malice standard because he had no duty to be as careful and conscientious as he was, he had no duty to fact-check major media outlets nor reason to believe they erred.

Plaintiff also alleges that the “malevolent” and “bloodthirsty” creatures of the “swamp” did not favor his candidacy. Amended Compl. at ¶¶ 2-6. This also is not actual malice. If

Plaintiff's Counsel's rhetoric was credited in *lieu* of pleaded facts (as it should not be), an accusation that some of the Defendants (the Amended Complaint does not specify who exactly) garnered ill will or spite would be a reference to common law malice, not constitutional (actual) malice. This distinction was best explained by Judge Easterbrook: "'actual malice' [is] a term that reads to the untutored eye as a proxy for 'ill will' but actually means knowledge that the statement was false, or doubts about its truth coupled with reckless disregard of whether it was false.' *Underwager v. Salter*, 22 F.3d 730, 733 (7th Cir. 1994).

An instructive case on point is the 2017 SLAPP lawsuit brought by the Resolute Forest logging company against Greenpeace activists. *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1027-28 (N.D. Cal. 2017). In *Resolute Forest*, the court even found that "the facts pleaded in Resolute's complaint could, if true, show ill will or bad faith." *Id.* at 1019. However, the court in that case not only dismissed the complaint under Rule 12(b)(6), but also awarded attorney's fees holding that plaintiff failed to plausibly plead that defendants knew what they were saying was false or that they "entertained serious doubts as to the truth." *Id.* at 1018-19 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974)).

Finally, the obvious defect that pervades and infects the whole of Plaintiff's Complaint is that it bizarrely attempts to plead over 100 alleged statements published at different times and in varying contexts by ideologically disparate parties under a single umbrella count of defamation. Earlier this year, Chief Judge Michael F. Urbanski of the Western District of Virginia, explained in an extensive opinion, "[t]hat the additional claims were pled collectively and presented under two umbrella counts, however, belies the fact that **each constitutes a discrete cause of action** arising under distinct circumstances... [i]n other words, Edwards' pleading numerous instances

of defamation under two counts does not relieve him of [pleading the elements]¹² on a claim-by-claim basis.” *Edwards*, 378 F. Supp. 3d 468, 491 (W.D. Va. Mar. 19, 2019) (bolded for emphasis); *see also English Boiler & Tube Inc. v. W.C. Rouse & Son, Inc.*, 1999 U.S. App. LEXIS 2725 at *9 (4th Cir. 1999) (“[e]ach act of defamation is a separate tort . . . **a plaintiff must specifically allege**”) (bolded for emphasis); *Hoai Thanh v. Ngo*, No. PJM 14-448, 2015 U.S. Dist. LEXIS 61061, 2015 WL 2227923, at *2 (D. Md. May 8, 2015), *aff’d sub nom. Hoai Thanh v. Hien T. Ngo*, 694 F. App’x 200 (4th Cir. 2017) (same). This is intuitive as it would stand to reason that the facts related to Defendant Feinberg and Breakfast Media’s state of mind, and specific knowledge or lack thereof, on May 21, 2018 (Amended Compl. ¶ 207) would likely be different than the facts related to Judge Andrew Napolitano on April 25, 2018 (*Id.* at ¶ 156), or the National Journal on April 10, 2018 (*Id.* at ¶ 154), or the DSCC on March 30, 2018 (*Id.* at ¶ 152), or “unknown persons” on March 25, 2018 (*Id.* at ¶ 151), or Zack Colman on January 26, 2018 (*Id.* at ¶ 149), etc.

Plaintiff does not get the benefit of a lesser pleading standard because he included half the population of Washington, D.C. in his lawsuit – he pleads only three paragraphs related to Mr. Feinberg and his employer which are as follows: (a) where they live or are headquartered (*Id.* at ¶¶ 67, 123) and (b) that Defendant Feinberg wrote a tweet (with one retweet and six likes) that asked a question (*Id.* at ¶ 207). That dog will not hunt. Plaintiff does not plead any other facts at all about Defendants Feinberg and Breakfast Media – not what they knew, not what they should or should not have known, no other history of interactions with Mr. Blankenship, no facts related to any agreement with any of these other Defendants – nothing. Mr. Feinberg and his

¹² In *Edwards*, the Plaintiff failed to plead jurisdiction by not arguing that each individual statement was directed into the forum state, but the same case-by-case analysis would be required for the underlying elements including actual malice in regard to an umbrella pleading.

employer are being sued for \$12 billion, despite literally no facts pled against them relating to actual malice or any other elements, for the act of quoting Plaintiff verbatim and asking a follow-up question that: (a) Plaintiff confirms is reasonable by conceding he was the only misdemeanor to serve a year in federal prison; (b) major news outlets have previously reported inaccurately upon the subject thereof; and (c) attempted to verify facts rather than just relying on other outlets. *Id.* Plaintiff needed to plead facts about Mr. Feinberg, his employer and their alleged statement, not about random allegedly “bloodthirsty” and “malevolent” “swamp” creatures, but about each specific Defendant and each specific statement. Otherwise, any Plaintiff could circumvent *Twombly* and *Iqbal*’s plausibility standard by naming half of the phonebook in their lawsuit.

B. The alleged statement is a question and is *ipso facto* non-actionable.

The Amended Complaint alleges that Defendant Andrew Feinberg published a tweet (allegedly imputed to his employer) that asked whether Plaintiff Blankenship is a felon or not. The full text of the tweet, as provided *supra*, quoted Plaintiff denying that he was a felon and came with the follow-up question, “[a]ren’t you a felon?” The Amended Complaint itself underscores why this question would be a reasonable one to ask: (a) there are over 100 media Defendants in this action, almost all of whom reported that Don Blankenship was a felon prior to Mr. Feinberg’s question; and (b) Plaintiff Blankenship spent a year in federal prison and may have been the only misdemeanor for whom that was true. There was no assertion of fact in Mr. Feinberg’s statement, it was instead a direct quoting of the Plaintiff and asking a question about others’ prior (mis)reporting.

“Reporters routinely and necessarily ask questions in order to obtain information, and the mere asking of a question may cast a shadow on the reputation of a person about whom the

question is asked. But a genuine effort to obtain information cannot be defamatory. A contrary rule would render legitimate reporting impossible." 1 Sack on Defamation § 2:4.8.

A question, "however embarrassing or unpleasant to the subject, is not [an] accusation." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4th Cir. 1993). In *Chapin*, the Philadelphia Inquirer reported about the finances of a charitable organization designed to allow people to send gifts to soldiers abroad. *Id.* at 1091. The report went on to ask the following question: "Who will benefit more from the project – GIs or veteran charity entrepreneur Roger Chapin...?" *Id.* at 1093-94. The court held that while the question was "pointed, and could certainly arouse a reader's suspicion," it still nonetheless could not "reasonably be read to imply the assertion of [a] false and defamatory fact." *Id.* at 1094. As another circuit explained two years later, "the rhetorical device used by [the defendant] negates the impression that his statement implied a false assertion of fact," the query itself underscoring the speaker's lack of definitive knowledge. *Partington v. Bugliosi*, 56 F.3d 1147, 1155 (9th Cir. 1995) (attorney's question about a co-defendant counsel's performance was not an assertion of fact); *see also Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 730 (1st Cir. 1992) (holding that a rhetorical question could not be understood as implying an assertion of fact); *Volm v. Legacy Health Sys., Inc.*, 237 F. Supp. 2d 1166, 1178 (D. Or. 2002) (The question "[w]ould you want to go to a hospital where they did not thoroughly check out the people who would be administering medical care to you?," which was posed to a patient, was not an assertion of objective fact because it was a question and so not "capable of being proven true or false.")).

For years courts had grappled with the concern that while a question by definition does not make an assertion of fact and does itself disclose to a reader the lack of definitive knowledge on the part of the publisher, is there nonetheless some possible question that may be defamatory?

In 2015, now-Justice Brett Kavanaugh put the debate to rest in a case over an article that questioned whether the sons of the Palestinian leader were using their position to enrich themselves to the detriment of their people. *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1331 (D.C. Cir. 2015). The decision can be summed up as follows “questions are questions... [and] questions are not factual representations.” *Id.* at 1338, 1339. If there were any doubts that some possible equivocation existed, Kavanaugh swiftly extinguished it stating:

After all, just imagine the severe infringement on free speech that would ensue in the alternative universe envisioned by Abbas. Is the Mayor a thief? Is the quarterback a cheater? Did the Governor accept bribes? Did the CEO pay her taxes? Did the baseball star take steroids? Questions like that appear all the time in news reports and on blogs, in tweets and on cable shows. *Id.*

Kavanaugh goes on to note that while some commentators and journalists use questions “as tools to raise doubts (sometimes unfairly) about a person’s activities... [nonetheless] to make out a defamation by implication claim even in cases involving affirmative statements [(let alone questions)], D.C. law requires an “especially rigorous showing.” *Id.* (citing *Guilford Transportation Industries, Inc. v. Wilner*, 760 A.2d 580, 596 (D.C. 2000)). As addressed *supra*, D.C. law applies to the present action under West Virginia’s *lex loci* conflict of law doctrine.

In this case, Plaintiff fails to plausibly plead facts sufficient to satisfy the especially rigorous standard for defamation by implication as regards Defendant Feinberg’s tweet (allegedly imputed to co-Defendant Breakfast Media) because the statement is in the form of a question and because Defendant Feinberg’s tweet further quoted Plaintiff’s denial of the claim he was a felon.

C. Plaintiff Fails to Properly Plead a Claim of False Light.

First, Plaintiff's false light claim is superfluous with his claim for defamation as is illustrated by the pleading of virtually identical facts under the two umbrella counts. Amended Compl. ¶¶ 222-250. The cause of action for false light (invasion of privacy) fails on grounds that Plaintiff has failed to plausibly aver actual malice in the alleged publication by Defendant Feinberg and Defendant Breakfast Media and because the alleged publication is in the form of a question. *Blodgett v. Univ. Club*, 930 A.2d 210, 223 (D.C. 2007) ("[W]here the plaintiff rests both his defamation and false light claims on the same allegations, as Blodgett has done here, the claims will be analyzed in the same manner.").

Additionally, Plaintiff fails to plead the requisite emotional injury, as would be required under either the laws of West Virginia or the District of Columbia. *Crump v. Beckley Newspapers*, 173 W. Va. 699, 716 (1983) ("privacy actions involve injuries to emotions and mental suffering, while defamation actions involve injury to reputation."); *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (D.C. Cir. 1948) (citations omitted) ("hurt done to the sensibilities of individuals"); *see also Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967). Instead, Plaintiff pleads \$2 billion in damages to speculative career opportunities for a career that he is on record having retired from nearly a decade ago and \$10 billion in punitive damages. n.3; Amended Compl. ¶¶ 24-25. Reputational and speculative business opportunities are not recognized damages under this tort. In fact, Plaintiff does not reference emotional distress damages in the body of the Amended Complaint and only makes a stray threadbare averment of such in the seventh paragraph after the Demand. This does not meet *Twombly* and *Iqbal*'s plausibility standard.

In essence, Plaintiff fails to plead the proper cause of action here as the relief he seeks is not the “vindication of the right of private personality and emotional security” for which this tort is recognized under D.C. law. *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 653 (1966) (*en banc*). In fact, a review of the relevant case law underscores the fact that this is an improper cause of action in this matter as the cases routinely deal with private persons (not prominent coal barons and U.S. Senate candidates) and private facts (as opposed to those that Mr. Blankenship makes note throughout his Complaint are freely available in the public record). Amended Compl. ¶¶230, 244; *See e.g., Vassiliades v. Garfinckel’s, Brooks Bros.*, 492 A.2d 580, (D.C. Cir. 1985) (private patient’s likeness used for commercial benefit by her plastic surgeon). In fact, the relevant section of the Restatement (Second) of Torts § 652D explains this stating that “publicity of a **private matter** may constitute an invasion of privacy.” Here, there is no private matter at issue, the alleged statements are about the outcome of a highly publicized criminal trial. Regardless, Plaintiff waived the right to crouch behind the laws of privacy by throwing his hat into the political ring. "The candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." *Monitor Patriot Co. v. Roy*, 401 U. S. 265, 274 (1971).

D. Plaintiff fails to plausibly plead conspiracy.

In the present matter, Plaintiff endeavors to stretch the legal doctrines of civil conspiracy and vicarious liability beyond their breaking point by seeking to hold two named Defendants liable for the speech acts of 100+ random media personalities on nothing more than the fact that Plaintiff Blankenship believes that all of these persons do not like him. Amended Compl. ¶¶ 2-6. As a matter of constitutional principle and policy, to accept Plaintiff’s postulation would be tantamount to accepting a wholesale repeal of the First Amendment – anybody who asks a

question on social media about a major news outlet's misreporting would now suddenly be cast in Mr. Blankenship's proposed reality as a co-conspirator. Plaintiff's position is so absurd that it almost belies citation as the Amended Complaint asks this court to round up hundreds of journalists into a single \$12 billion action on nothing more than Mr. Blankenship's threadbare averment that unnamed persons ("Conspiracy Does") "cause[d] and/or **encourage[d]** others." (bolded for emphasis). *Id.* at ¶234. Such alleged "encourage[ment]" does not equal an agreement.

The elements of civil conspiracy under District of Columbia law require that a plaintiff plausibly plead facts indicating that: (1) "**an agreement**" was made between the alleged co-conspirators; (2) "to participate in an unlawful act, or in an unlawful manner; and (3) an injury caused by an unlawful overt act performed by one of the parties of the agreement; (4) pursuant to, and in furtherance of, the common scheme." *Griva v. Davison*, 637 A.2d 830, 848 (D.C. 1994) (citations omitted) (bolded for emphasis).

In this action, Plaintiff fails to plead any facts relating to the existence of any purported agreement that existed between Defendants Feinberg and Breakfast Media with any of the other co-Defendants. Instead, Plaintiff only pleads Defendant Feinberg and Breakfast Media's place of domicile along with an out-of-context partial excerpt of Mr. Feinberg's tweet – that's all and nothing else. Amended Compl. ¶¶ 67, 123, 207. Moreover, Plaintiff does not bother to make even a threadbare assertion that Mr. Feinberg and Breakfast Media had any agreement in relation to any of the co-defendants' specific publications, as is required, because each allegedly defamatory publication is a separate cause of action. Further, the alleged statement by Defendants Feinberg and Breakfast Media are not temporally proximate with the other statements, but rather each are months apart from one another. Plaintiff's 'allegations connecting [Defendants] to the transmission of the [other alleged statements]... are, as one court put it,

“gossamer thin and reed slender.” *Edwards*, 378 F. Supp. 468, 498 (refusing to impute jurisdiction based on an alleged conspiracy where the averred concerted behavior was factually unsupported) (quoting *Clark v. Milam*, 830 F. Supp. 316, 324 (S.D. W. Va. 1993)).

Furthermore, on the claim of conspiracy the Amended Complaint contradicts itself and appears to exclude Defendants Feinberg and Breakfast Media from the assertion of vicarious liability. The Amended Complaint specifically defines “Conspiracy Defendants” as the “NRSC, 35th PAC, and McLaughlin” which, by its plain reading, would seem to indicate that only those individuals are specifically alleged to have partaken in an alleged conspiracy to publish defamatory statements. Amended Compl. ¶ 234. “NRSC, 35th PAC, and McLaughlin” are not references to Defendants Andrew Feinberg and Breakfast Media, and, by the plain meaning of words, these two Defendants (Feinberg and Breakfast Media) cannot be “Conspiracy DOES” as they are both named parties in this action. *Id.*

Therefore, Mr. Blankenship not only failed to plausibly plead conspiracy in relation to Defendants Feinberg and Breakfast Media, but Plaintiff also expressly excluded these two Defendants from an enumeration of parties alleged to be involved in a conspiracy to defame.

E. Plaintiff Fails to Plausibly Plead Personal Jurisdiction – Fed. R. Civ. P. 12(b)(6)

Plaintiff failed to plead that Defendants Feinberg and Breakfast Media had “continuous and systematic” contact with the forum state to support general personal jurisdiction. *CFA Inst. v. Inst. of Chartered Fin. Analysts of India*, 551 F.3d 285, 292, n.15 (4th Cir. 2009). The Amended Complaint also does not support specific jurisdiction per *Calder v. Jones*, 465 U.S. 783 (1984).

As explained in *CFA Inst.*, specific jurisdiction looks to whether the “relevant conduct has such a connection with the forum state that it is fair for the defendant to defend itself in the

state,” i.e. was alleged tortious conduct directed into the state. *Id.* The torts alleged requires a publication to a third-party – @DonBlankenship is not a third party – causing reputational injury. Plaintiff does not allege that Feinberg and Breakfast Media directed the tweet into West Virginia, nor does Plaintiff allege that even a single West Virginia third-party saw the tweet.

The touchstone of a specific jurisdiction analysis is the quality, as opposed to quantity, of the contacts with the forum state such that “even a single contact may be sufficient.” *Carefirst of Md. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397 (4th Cir. 2003). Under the 4th Circuit’s three-part analysis in *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, the alleged tweet to the general public was a “passive” contact not targeting West Virginia (transmitting to @DonBlankenship does not count as it is not alleged as tortious, only transmitting to third parties is). 293 F.3d 707, 712 (4th Cir. 2002). Thus, the “quality” of the contact is *de minimis* and exercising personal jurisdiction in this case would not be constitutionally reasonable. *Id.*

CONCLUSION

WHEREFORE, Defendants Andrew Feinberg and Breakfast Media, LLC request that the Court grant this Motion to Dismiss and enter judgment in their favor dismissing the Amended Complaint’s claims against them with prejudice.

Dated: August 16, 2019

Respectfully Submitted,

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**DON BLANKENSHIP,
Plaintiff,**

**Civil Action No.: 2:19-cv-00236
Judge John T. Copenhaver, Jr.**

v.

**HONORABLE ANDREW NAPOLITANO (RET.),
et al.,
Defendants.**

CERTIFICATE OF SERVICE

The undersigned counsel for Defendants Breakfast Media, LLC and Andrew Feinberg, hereby certifies that the foregoing “Memorandum in Support of Motion to Dismiss” was served on all counsel of record through the CM/ECF system.

/s/ Adriana Marshall
W. Va. State Bar I.D. #10710